

Wilcox v. Lyons, et al., 7:17cv530, 3/22/18

1 UNITED STATES DISTRICT COURT  
2 FOR THE WESTERN DISTRICT OF VIRGINIA  
3 ROANOKE DIVISION

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4 COLETTE MARIE WILCOX, CIVIL CASE NO.: 7:17CV530  
5 March 22, 2018 - 3:10 p.m.  
6 Roanoke, Virginia  
7 Plaintiff, Motions Hearing

8 vs.

9 NATHAN H. LYONS, ESQ., Before:  
10 PHILLIP C. STEELE, ESQ., HONORABLE MICHAEL F. URBANSKI  
11 CARROLL COUNTY, VIRGINIA, CHIEF UNITED STATES DISTRICT JUDGE  
12 WESTERN DISTRICT OF VIRGINIA

13 Defendants.

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14 APPEARANCES:

15 For the Plaintiff: THOMAS EUGENE STRELKA, ESQUIRE`  
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23 For the Defendants  
24 Lyons and Steele: HENRY S. KEULING-STOUT, ESQUIRE  
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30 PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY;  
31 TRANSCRIPT PRODUCED BY COMPUTER.

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1 APPEARANCES CONTINUED:

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1 (Proceedings commenced, 3:10 p.m.)

2 THE COURT: Good afternoon. Please call the case.

3 THE CLERK: *Colette Marie Wilcox versus Nathan H.*  
4 *Lyons, Esquire, and others*, Civil Action Number  
5 7:17-CV-00530.

6 THE COURT: Okay. Good afternoon, counsel.

7 The Court has read all that you have filed on the  
8 subject of this lawsuit, all the briefs, the cases. I'm up  
9 to speed on the legal arguments that have been made.

10 So let's see. I want to hear argument first from  
11 Carroll County. Ms. Royer, let's hear from you.

12 MS. ROYER: Before I begin, I apologize. I'm  
13 fighting some sickness and I might cough at you a little bit.  
14 I apologize.

15 So, Your Honor, at the end of the day this is an  
16 employment --

17 THE COURT: Well, I know you won't be coughing at  
18 me; you'll just be coughing.

19 MS. ROYER: In your general direction.

20 THE COURT: Right. I'm sorry for that too. There's  
21 a bunch of stuff going around.

22 MS. ROYER: Your Honor, the overarching theme of our  
23 argument is that Carroll County was not Ms. Wilcox's employer  
24 and is, therefore, not liable for any employment  
25 discrimination claim she may have.

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1           As the Court knows, having read the pleadings in the  
2 case and everything we've cited, Mr. Lyons is a  
3 constitutional officer. Ms. Wilcox acknowledges in her  
4 pleadings that she was employed by Mr. Lyons as a  
5 constitutional officer.

6           And as the Court is also well aware, it's  
7 well-established in Virginia law that constitutional officers  
8 are neither agents of nor subordinates of the local  
9 government and that the local government has no control over  
10 their work performance.

11           THE COURT: He claims that the *Butler* joint employer  
12 doctrine applies based on an allegation, I think, in  
13 paragraph 95, I think it was, unless I got it wrong. Let me  
14 look. No, that's a different -- that's a different point.

15           It's paragraph -- excuse me. I just got the number  
16 wrong. Paragraph 85, "Upon information and belief, at all  
17 times material hereto, Carroll County provided funding to the  
18 Carroll County Commonwealth's Attorney's Office to monetarily  
19 support Ms. Wilcox's position as Deputy Commonwealth  
20 Attorney."

21           Is that sufficient -- are sufficient facts pled in  
22 this complaint to meet the *Butler* test?

23           MS. ROYER: No, Your Honor. And as the Court is  
24 well aware of the *Butler* factors, one of the overarching  
25 things that must be proven is that the putative employer

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1 exercises control over the putative employee.

2 THE COURT: Isn't that inconsistent with the  
3 allegations in this case? Because the allegations in this  
4 case are that the Commonwealth's Attorney stood up, turned  
5 his back on the plaintiff, and said, "You're fired for  
6 insubordination," without any control, involvement, exercise,  
7 anything, by Carroll County. He just did it.

8 MS. ROYER: That's exactly right.

9 THE COURT: Doesn't that fly sort of in the face of  
10 the first two *Butler* factors, the first one being the right  
11 to hire and fire, and the second one being the right to, I  
12 believe, day-to-day supervision of the individual, including  
13 employee discipline? There's no allegation of that.

14 MS. ROYER: There is none.

15 THE COURT: Why is this case any different from  
16 Judge Dillon's case in 2016 in the *Leuenberger versus Spicer*,  
17 where there was an allegation against the Commonwealth  
18 Attorney in Frederick County, and the allegation was that  
19 Frederick County employed this particular Assistant  
20 Commonwealth's Attorney, and the allegations there were just  
21 like here, that -- that there was -- that there was some --  
22 some involvement of salary supplement and some involvement of  
23 space, and nothing more? You know, the county space and the  
24 county provided a salary supplement. Nothing about  
25 supervising, giving assignments, hiring, firing, all the

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1 other things that are telltale of an employer-employee  
2 relationship. I mean, isn't *Leuenberger* squarely on point?  
3 Shouldn't the Court follow it?

4 MS. ROYER: Yes, Your Honor. The --

5 THE COURT: If I do that, doesn't that simply  
6 eliminate Carroll County entirely?

7 MS. ROYER: Yes, Your Honor.

8 THE COURT: All right. Let's hear from Mr.  
9 Keuling-Stout on behalf of the Assistant Commonwealth  
10 Attorney and the Commonwealth Attorney.

11 Thank you, Ms. Royer. I thought your brief was well  
12 done, by the way. Thank you.

13 MR. KEULING-STOUT: Good afternoon, Your Honor.

14 THE COURT: Good morning, and welcome to the  
15 northeast.

16 MR. KEULING-STOUT: Thank you very much. Thank you  
17 very much. And the snow is just enough that there was no  
18 problem getting from Big Stone Gap to here.

19 THE COURT: Well, that's good.

20 MR. KEULING-STOUT: It looked beautiful on the  
21 mountaintop.

22 In preparing for this, I noted several items that I  
23 thought would be of assistance -- that could be of assistance  
24 to the Court. I noticed -- and what I'm basing it on is the  
25 complaint itself, and there's 155 of these items, and number

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1 14 states that, among other things, Ms. Wilcox around the  
2 morning of 30 November --

3 THE COURT: I'm sorry, you're on 13?

4 MR. KEULING-STOUT: I'm on 14.

5 THE COURT: 14. I'm sorry. Let me pull that up.

6 Thank you. Go ahead. I got it.

7 MR. KEULING-STOUT: Okay. Good.

8 And the important thing is where she said that she  
9 was standing. She was standing in the office of Victim  
10 Witness Director Teddy Felts. The office, in other words,  
11 where this occurred was not in the Commonwealth Attorney's  
12 office, it was in the Office of Victim Witness -- that is, he  
13 has -- I think he's a -- the Victim Witness Program, he's the  
14 director of it; Teddy is.

15 So what I wanted to say was where this is to have  
16 happened happened in the Office of Victim Witness, it was not  
17 the office of any of the Commonwealth Attorneys or Assistant  
18 Commonwealth Attorneys. It was close-by, yes.

19 THE COURT: Was the Victim Witness Director's Office  
20 in the same sort of suite of offices --

21 MR. KEULING-STOUT: Yes.

22 THE COURT: -- as the Commonwealth's Attorney?

23 MR. KEULING-STOUT: Yes.

24 THE COURT: Okay. So why does that matter?

25 MR. KEULING-STOUT: It matters because what is going

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1 on -- because the next step has nothing to do with it.

2 THE COURT: Okay. Go ahead.

3 MR. KEULING-STOUT: The next step is I noticed that  
4 there was a -- there was a case that had been ruled on on  
5 January 24, 2018, called *Nexus Services v. Vance*, and that  
6 kind of speaks for the whole thing, that what was happening  
7 here --

8 THE COURT: Was that my case?

9 MR. KEULING-STOUT: It is.

10 THE COURT: Yeah, I seem to recall it.

11 MR. KEULING-STOUT: It is. And then the interesting  
12 thing, the very important thing about it is if you look at --

13 THE COURT: That's the one where the person who was  
14 employed as a deputy sheriff in Augusta County went onto some  
15 property, right?

16 MR. KEULING-STOUT: Right. It had nothing to do  
17 with being a police officer whatsoever.

18 THE COURT: Right. That's what I found. Of course,  
19 they've appealed that, but, you know, it is what it is.

20 MR. KEULING-STOUT: Well, yeah.

21 Now, if you look at the paragraph number 83 -- up  
22 until then, you had paragraph 83, 101, 119, 125, and 134.  
23 The one to look at is 125. 125 states -- let me get 125  
24 here. Yeah, each of them -- they were attempting to -- what  
25 the word is, is Steele, Phillip Steele, is a state employee,



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1 so he has color of law.

2 Well, number 25 [sic] says, "Because the actions of  
3 Mr. Steele were within the scope of his employment as a state  
4 employee, but not within the scope of his prosecutorial  
5 duties...."

6 Now, he has put himself even more into the decision  
7 that was made by you that all that was happening in here,  
8 what was happening in here had nothing to do with what his  
9 job was, nothing whatsoever. What they were talking about  
10 was, in fact --

11 THE COURT: Problems with families over  
12 Thanksgiving.

13 MR. KEULING-STOUT: That's right.

14 THE COURT: That's what the discussion was --

15 MR. KEULING-STOUT: Yes.

16 THE COURT: -- that led to this alleged push or  
17 punch, or whatever it was.

18 MR. KEULING-STOUT: Yes.

19 THE COURT: Right.

20 MR. KEULING-STOUT: And so what I'm saying is is  
21 that it is covered perfectly or very accurately with the case  
22 of *Nexus versus* -- let's see, *Nexus Services v. Vance*.

23 THE COURT: But isn't that case distinguishable  
24 because, one, this is happening within -- within the county  
25 offices, whether it's -- not county, but within the

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1 Commonwealth Attorney's Office, and these folks were all  
2 working at this time, whereas Ms. Vance was off duty, after  
3 hours, and just happened to have her Augusta County sheriff's  
4 polo shirt on when she drove onto the Nexus Services  
5 property? So can't you argue that case is distinguishable?

6 MR. KEULING-STOUT: No, because --

7 THE COURT: Why not?

8 MR. KEULING-STOUT: The important part of it is is  
9 what you were talking about had nothing to do with the  
10 Commonwealth Attorney or Assistant Commonwealth Attorney, or  
11 anything the Commonwealth Attorneys would be doing, nothing.  
12 They're talking about family and notions of that nature.

13 THE COURT: Okay. I got your argument.

14 MR. KEULING-STOUT: All right.

15 THE COURT: Hadn't thought of that one, but I got  
16 your argument.

17 MR. KEULING-STOUT: All right.

18 One thing that I noticed -- and this is in number  
19 20 [sic] -- when I pulled up something was, she indicates  
20 that she was mistreated, says -- let's see, stand up for  
21 female relatives. But there was no mention of females in the  
22 office. In other words, part of what she would be required  
23 to say is, Look, this Commonwealth Attorney's office is  
24 horrible and all the women are having a problem. There's no  
25 indication that they are. The only females and women that

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1 were discussed were family, and it really wasn't -- it wasn't  
2 talking about Ms. Wilcox's family, it was talking about the  
3 family of Teddy Felts, who does not work for the Commonwealth  
4 Attorney.

5 I also felt that it's important for me to make sure  
6 that we -- it's significant to me. In number 36, we have the  
7 Commonwealth's Attorney -- the Commonwealth's Attorney,  
8 Lyons -- he meets with Ms. Wilcox and asks Ms. Wilcox how to  
9 resolve the situation.

10 Number 37, she said, I'm really not sure.

11 Number 38, Attorney Lyons then asks if Mr. Steele,  
12 Phillip, could come into the room. No.

13 At that point, Lyons, the Commonwealth's Attorney,  
14 apologizes for the hostility, the situation.

15 Number 40, Assistant Commonwealth Attorney Steele  
16 asks Ms. Wilcox if they could speak. No.

17 Number 48, Ms. Wilcox informs Steele, quote, "that  
18 she wished to leave the incident in the past," end quote.

19 So they were determining -- talking to each other,  
20 and the person who is filing the suit has said that she  
21 wished to leave the incident in the past.

22 There's nothing about -- there's nothing that  
23 happened before or after. And when you look -- and I keep  
24 harping on this, but I harp in a sort of important way. It  
25 is the statement that she made -- the e-mail that she wrote

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1 to Commonwealth Attorney Lyons, and she mentions it in  
2 document -- in paragraph 35, so she admits it -- I mean, she  
3 talks about it, number 35. She -- let me get to 35. At  
4 approximately 4:30 p.m. on the 30th of November, sent an  
5 e-mail to Mr. Lyons.

6 This is it, that we've been looking at. And in it,  
7 importantly, it says, "I asked what that was for and said not  
8 to use me as demonstrative evidence. I'm very disturbed and  
9 upset by the incident. I had just spoke with Phillip just  
10 minutes before a case. He was cordial and even chatted about  
11 Thanksgiving."

12 Now, that's the long and the short of it. The  
13 incident happened in somebody else's office in the morning,  
14 whatever the time was, talking about family problems, nothing  
15 to do with any of their jobs, and nothing happened before  
16 referencing Phillip and Ms. Wilcox, nor after.

17 So when you're talking about a case of this nature,  
18 you have to have something that's serious, something that she  
19 was thrown off or she was told, you know, just horrible  
20 things.

21 Here, I mean, I take my hat off to her. She said,  
22 "I just spoke to Phillip just minutes before a case. He was  
23 cordial and even chatted about Thanksgiving." And he did  
24 come -- he came to see if they could talk. And the  
25 Commonwealth Attorney, the senior, asked the same thing.

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1 And so it sounded like to me there was something  
2 that didn't work right, that there was some type of a joust  
3 or something; and then they were talking about, let's take  
4 care of it. And I just don't see that as being something  
5 that fits into the law that's attempting to be sought out  
6 today.

7 THE COURT: What about paragraph 43?

8 MR. KEULING-STOUT: "As December of 2015 wore on,  
9 Ms. Wilcox's coworkers, such as Mr. Felts and Mr. Jones,  
10 distanced themselves from Ms. Wilcox."

11 That's a statement.

12 THE COURT: In paragraph 44, she claims, Ms. Wilcox  
13 claims ostracism by the other -- by the other office workers.

14 So the question is: Is this one episode that  
15 happens in Mr. Felts' office, combined with some distance and  
16 ostracism, sufficient under the law to give rise to a  
17 sufficiently severe and pervasive hostile work environment?  
18 That's the question.

19 MR. KEULING-STOUT: The answer is no, because all  
20 that is said is such as -- let's see, as December wore on,  
21 coworkers distanced themselves.

22 How? There's no indication of what she's talking  
23 about.

24 "On or about December 16th, Ms. Wilcox attempted to  
25 improve the work environment that had seemingly ostracized

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1 her for complaining about being physically assaulted," so on  
2 and so forth, "gathered her courage," but what are the  
3 examples of what she's talking about? She's talking about on  
4 a level up here. But what are the facts? It's just like,  
5 well, he bothered me, and I thought this. What's the  
6 evidence right here?

7 THE COURT: Well, but, you know, all your evidence  
8 in the case --

9 MR. KEULING-STOUT: I understand.

10 THE COURT: -- is this sufficient, in other words,  
11 to put you on notice? And if it's not sufficient to put you  
12 on notice, should the plaintiff be given an opportunity to  
13 amend these pleadings to establish a hostile work environment  
14 claim?

15 MR. KEULING-STOUT: Well, if it would be the case  
16 that the Court would -- would -- from what 30, 43, and 44  
17 state, I don't think it's sufficient.

18 What the Court I understand is saying is, it might  
19 say, okay, then Ms. Wilcox, you have the opportunity to  
20 change that. And, of course, I cannot say no to that, but I  
21 can certainly say that I don't think it -- 43 and 44, it does  
22 not meet the requirements needed for 43 and 44, for what's  
23 being alleged.

24 And then I think I said all I need to say about the  
25 Commonwealth Attorney and the absolute immunity. And I don't

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1 have anything in addition to say. I just think it's  
2 extremely -- I can say a little something. My thought is you  
3 have a person who has agreed to all of these different  
4 things, and the concern of the senior -- the Commonwealth's  
5 Attorney, the Commonwealth's Attorney, was that, okay, she  
6 isn't coming -- she called up and said, Oh, I can't be there,  
7 and so people in the office -- there's only, I think, one,  
8 two, three, four -- there's only four, and so she's not --  
9 she's in the case -- or the -- not circuit court, but she's  
10 in the court where they work for the children and all of that  
11 thing. And so when you go, when one of the people go to take  
12 -- "Oh, then I'll go there," there's just not one case that  
13 day. There might be five, ten, 15 cases that day. So she  
14 just said, "Oh, I'm not going, I'll see you tomorrow," or "I  
15 won't see you tomorrow."

16 And then, yeah, the administration, that's what the  
17 new case did, is to show the necessity for -- that putting in  
18 administration as something that for the -- for absolute to  
19 prevail can be done at the administerial [sic],  
20 administration, whatever, that level.

21 Up until this time it was, okay, if the  
22 Commonwealth's Attorney made a big mistake, and all that  
23 nature, in the courthouse, in the courtroom, then whatever  
24 happened, basically, you just had absolute, it was absolute.

25 THE COURT: What you're saying is that under the Van

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1 de Kamp case, that because the issues that the Commonwealth's  
2 Attorney was having with Ms. Wilcox related to her not  
3 showing up for court to handle the docket for the  
4 Commonwealth's Attorney, that that relates to -- that is an  
5 administrative obligation that relates -- that falls under  
6 the rubric of the -- the -- the Commonwealth's Attorney's  
7 role as prosecutor and, therefore, there is absolute immunity  
8 there.

9 MR. KEULING-STOUT: Absolutely. And it had been  
10 thought of since 1996 when Judge Powell, in a case here from  
11 our state, he's urging that it needs to be done, but as he  
12 said, we can't do that in this case because we're not talking  
13 about the administration.

14 But then the next case, as I've said, the most  
15 recent one, which is the -- I have it here somewhere. But  
16 the most recent one, the one that said yes to the  
17 administration, they now said, okay, we can now do it. But  
18 it keeps going back to the first of the cases upon which it  
19 relies, which is the case of -- which is the *Van de Kamp*  
20 case. And the earlier case was the *Imbler*, I-M-B-L-E-R,  
21 case.

22 THE COURT: *Imbler*, right.

23 MR. KEULING-STOUT: *Imbler*.

24 One more thing. I did find -- I was somewhat not  
25 convinced one way or the other, but I do have -- did find --



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1 the issue was there's been no -- there's been no description  
2 in this case or no statement in this case by the complainant  
3 that the EEOC had been taken care of that they'd gone to see  
4 them. It's not there at all.

5 Well, the case of G-E -- strike that.  
6 G-U-E-S-S-O-U-S v. Fairview, F-A-I-R-V-I-E-W, Fourth Circuit,  
7 828 F.3d 208, says that it is -- the EEOC does have to be  
8 required before you can pursue as the plaintiff is attempting  
9 to do.

10 THE COURT: Even in a 1983 case?

11 MR. KEULING-STOUT: From my understanding, yes.

12 THE COURT: Because, I mean, this isn't a Title VII  
13 case. This is a 1983 case. He doesn't bring Title VII for  
14 any number of reasons. One, probably because of the issue  
15 with not -- not more than 15 employees, and then the other  
16 one with the concern that it doesn't look like there was a  
17 charge of discrimination brought with EEOC in this case. It  
18 doesn't appear. It's not alleged, anyway. I don't know  
19 whether it was or whether it wasn't. Okay.

20 MR. KEULING-STOUT: I know the answer to that, but  
21 it has not been presented, and my understanding is -- let's  
22 see. To assist, it would be on page 221 of that statement I  
23 just mentioned.

24 THE COURT: 201?

25 MR. KEULING-STOUT: I'm sorry. 221. 221.

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1 THE COURT: Oh, in that case that you just --

2 MR. KEULING-STOUT: Yes, in the --

3 THE COURT: *Fairview* case?

4 MR. KEULING-STOUT: Yes.

5 THE COURT: *Fairview* is easier to say.

6 MR. KEULING-STOUT: Absolutely. Thank you very  
7 much.

8 It says, "The District Court granted Fairview's  
9 motion for summary judgment on Count Five, finding the  
10 Geussous's Title VII hostile work environment claim was  
11 time-barred. To pursue a claim under Title VII, a Title VII  
12 charge must be filed with the EEOC within the statutory  
13 defined period of time of either 180 or 300."

14 My understanding of that is, yes, it's required.

15 THE COURT: Okay. Anything else you want to argue,  
16 Mr. Keuling-Stout?

17 MR. KEULING-STOUT: No.

18 THE COURT: Thank you. Let's hear from the  
19 plaintiff.

20 Good afternoon, Mr. Strelka.

21 MR. STRELKA: Good afternoon, Your Honor. May it  
22 please the Court. I am Tommy Strelka, here today on behalf  
23 of Ms. Wilcox.

24 There's a number of issues before the Court.  
25 Usually, Your Honor, you are always extremely well read up on

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1 the briefs.

2 THE COURT: I read them all.

3 MR. STRELKA: I know you did. So I can either begin  
4 my argument or I can address questions that you have based on  
5 anything.

6 THE COURT: Let's talk about the county's argument  
7 first.

8 MR. STRELKA: Yeah, okay. I don't want to waste the  
9 county's time. I don't want to waste the Court's time. I  
10 don't want to waste anybody's time. In the other case that  
11 you mentioned with counsel's lawyer regarding --

12 THE COURT: Judge Dillon's case.

13 MR. STRELKA: Judge Dillon's case, yes.

14 All I can say is there's a lacuna of knowledge about  
15 what \$600,000 is doing going from the county to this  
16 Commonwealth Attorney. I can speculate under the *Butler* test  
17 as to a number of factors that could be checked off. Under  
18 that, I have no clue what that amount is being spent on. I  
19 have asked counsel for the county for information regarding  
20 that, any information regarding that, prior to this hearing,  
21 with the indication that it doesn't show much at all, we  
22 dismiss this.

23 You know, I don't -- I'm not trying to get -- I'm  
24 not trying to shoehorn defendants in a case they don't  
25 deserve, but I've also got duties as an advocate for my

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1 client. And I read *Butler*, and I'm looking at a budget with  
2 600,000 --

3 THE COURT: You know, the Virginia Code says, look,  
4 the county has got to provide space, and then they have the  
5 compensation board that provides some salaries.

6 MR. STRELKA: Sure.

7 THE COURT: And isn't that just exactly what Judge  
8 Dillon dealt with in the *Leuenberger* case? I mean, there is  
9 no allegation that anyone in the county had any control over  
10 the hiring and firing or the supervision of Ms. Wilcox. You  
11 agree with me that there's no allegation as to that?

12 MR. STRELKA: I agree.

13 THE COURT: Okay. And your allegation is that, in  
14 fact, Mr. Lyons stood up, turned around, and said, "You're  
15 fired for insubordination."

16 MR. STRELKA: Absolutely.

17 THE COURT: Okay. All right.

18 MR. STRELKA: And I just want to add, you know, if I  
19 had -- in the other case with Judge Dillon, they knew exactly  
20 what money was being spent on.

21 THE COURT: It was a 12(b)(6), just like this one.

22 MR. STRELKA: Right, but they knew more information  
23 coming into court than I know right now.

24 THE COURT: They also alleged joint employment in  
25 that case. You haven't even alleged that. We're just

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1 straining to infer it.

2 MR. STRELKA: I'm operating on the best good faith  
3 basis I can, and all I can tell you is that I have no clue  
4 what the delineation of those funds is. I don't know if it  
5 is as limited as Judge Dillon's case.

6 THE COURT: The Fourth Circuit said, like, the first  
7 few factors are the most important.

8 MR. STRELKA: Sure.

9 THE COURT: And you don't get any of those.

10 MR. STRELKA: Right. I completely understand your  
11 concerns, the county's concerns. It's all well-meant. It's  
12 a unique situation. As an advocate, I do what I do.

13 I would ask the Court to perhaps open up very  
14 limited discovery on the notion of what that amount might be  
15 for, but I'll leave it up to the Court's discretion how to  
16 handle it.

17 I considered making a Freedom of Information Act  
18 request, but I'm unsure about how much I would get from that  
19 if it's personnel records or if it categorizes one of the  
20 exempt --

21 THE COURT: I don't know.

22 MR. STRELKA: Yeah, I don't know, either. I have no  
23 other information on the subject. And there we have it.

24 THE COURT: Okay. Let's talk about the 12(b)(6)  
25 filed by Mr. Lyons and Mr. Steele. Would you first like to

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1 address the issue of the claim of absolute immunity in the  
2 *Van de Kamp* case?

3 MR. STRELKA: Sure. *Van de Kamp* and *Imbler*, my  
4 understanding, these cases are coming from litigants who are  
5 alleging some sort of wrongful conviction.

6 THE COURT: *Van de Kamp* involved a *Giglio* violation.

7 MR. STRELKA: And in the course of their claims they  
8 also alleged 1983 causes of action. And in both cases it was  
9 quite clear in those cases that the acts and/or omissions  
10 that the plaintiffs were complaining of were strictly related  
11 to decisions and discretionary acts made within the  
12 functional scope of a prosecutor.

13 THE COURT: For example, in *Van de Kamp*, the issue  
14 was that the Commonwealth's Attorney or the prosecutor -- not  
15 the Commonwealth's Attorney. The prosecutor in that case  
16 didn't engage in appropriate administration in training the  
17 lawyers that he or she was supervising on what is required by  
18 the Constitution in terms of discovery. So, in other words,  
19 in *Van de Kamp*, it's much more directly related to the issues  
20 of what a prosecutor does.

21 MR. STRELKA: How to be a lawyer. How to be a  
22 lawyer. And --

23 THE COURT: Whereas this case is --

24 MR. STRELKA: Right.

25 THE COURT: -- simply an employment situation.

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1 MR. STRELKA: It involves issues of absenteeism,  
2 tardiness, insubordination.

3 THE COURT: Leave.

4 MR. STRELKA: Scheduled leave, yes.

5 And those issues are present with every single  
6 employer in the Western District of Virginia this last week  
7 with the snow. I mean, these are fundamental, intrinsic  
8 issues related to every single type of employment that I  
9 could possibly hypothetically imagine.

10 So, you know, this case falls well outside of the  
11 realm of the cases that indicate, you know, this functional  
12 prosecutorial -- and it makes sense why they have that  
13 absolute immunity, but not in this case.

14 THE COURT: Let's talk about your other counts,  
15 then. Let's just assume for the sake of argument that *Van de*  
16 *Kamp* and *Imbler* are distinguishable. Let's talk about your  
17 claims one by one.

18 Let's talk about your first claim. And that is,  
19 under 1983, for sex discrimination.

20 MR. STRELKA: Yes.

21 THE COURT: One argument Mr. Keuling-Stout makes  
22 here is, based on the case law, that you never filed a charge  
23 of discrimination under Title VII.

24 What is your response to that?

25 MR. STRELKA: First off, there's not enough

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1 employees under this employer to be actionable, to have  
2 jurisdiction under Title VII; so there's that. But there's  
3 also the *Booth* case from the Fourth Circuit.

4 THE COURT: Well, now, wait a minute. Wait a  
5 minute. Aren't you hanging yourself on the horns of a  
6 dilemma here, Mr. Strelka? Because if, indeed, Ms. Wilcox,  
7 as you allege, is a county employee or if there's a joint  
8 employer --

9 MR. STRELKA: Right.

10 THE COURT: -- wouldn't there be enough employees in  
11 the whole county?

12 MR. STRELKA: In fact, we did file an EEOC charge  
13 against the county, Your Honor. We did.

14 THE COURT: Against the county?

15 MR. STRELKA: Against the county, yeah.

16 THE COURT: Okay.

17 MR. STRELKA: And so but based on --

18 THE COURT: This is kind of fun, Mr. Strelka.

19 MR. STRELKA: It is. I understand. It is. And I  
20 find this case to be very interesting from a legal  
21 perspective. And we're only trying to do the best we can to  
22 cover the bases of our client with reason.

23 THE COURT: Okay. So let's assume for the sake of  
24 argument Title VII doesn't apply. Because you haven't  
25 alleged Title VII.



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1 MR. STRELKA: Right.

2 THE COURT: You've alleged a 1983 violation for sex  
3 discrimination. Right?

4 MR. STRELKA: Right.

5 THE COURT: Tell me why that -- what aspect of this  
6 pleading gives rise to a claim that the actions taken against  
7 Ms. Wilcox were done on the basis -- were improper and done  
8 on the basis of her gender and that men were treated  
9 differently.

10 MR. STRELKA: Sure. Well, first and foremost, I  
11 just want to say out of the gate that the case has stronger  
12 implements that support retaliation as opposed to sexual  
13 harassment. The sexual harassment itself, though --

14 THE COURT: No, no, I'm talking about Count One, sex  
15 discrimination.

16 MR. STRELKA: I'm sorry. I'm sorry.

17 THE COURT: We haven't even gotten to Counts Two,  
18 Three, Four yet. Count One.

19 MR. STRELKA: I misspoke. Sexual discrimination,  
20 that she was treated differently than similarly situated male  
21 employees. You know, the facts are what the facts are.

22 THE COURT: You allege in paragraph 105 that -- I  
23 mean, that is purely conclusory. Paragraph 105 of your  
24 pleading says -- no, I'm sorry, it's 95. I'm sorry. I got  
25 my 5s wrong. "Similarly situated male employees did not have

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1 to endure the discriminatory treatment that Ms. Wilcox  
2 endured."

3 That is conclusory. And where are the facts to  
4 support any allegation that there is disparate treatment on  
5 the basis of gender?

6 MR. STRELKA: Right. What I can point to in the  
7 complaint are her complaints regarding what occurred in the  
8 office on November 30, 2015: Not being taken seriously; not  
9 being given thoughtful consideration; there being no  
10 meaningful discipline or investigation into Mr. Steele's  
11 conduct; and just an overall flippant response to any of this  
12 moving on.

13 You know, there aren't many employees there; it's a  
14 small employer. And with small employers, I've always found  
15 it to be much more difficult regarding sexual discrimination  
16 complaints because things are more personalized.

17 And the facts are what the facts are. I can't add  
18 anything other than what I've said and what the Court has  
19 already mentioned. If the Court finds it insufficient, we'll  
20 look back -- with leave of the Court, look back to see if  
21 it's possible to amend to resuscitate. But as it relates to  
22 sex discrimination, that's just what I had to do.

23 THE COURT: Let's talk about Count Two, then.

24 MR. STRELKA: Okay. Which one? I've got the  
25 complaint right here. Count Two.

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1 THE COURT: Count Two is retaliation.

2 MR. STRELKA: Yes. So we allege in paragraphs 35  
3 and 36 that she's making complaints to Mr. Lyon -- Mr. Lyons  
4 regarding what has occurred and that explains --

5 THE COURT: Right, I understand that there was this  
6 issue on November 30th. Okay. Where's the causal link  
7 between what happened then and the adverse employment action,  
8 which was her termination?

9 MR. STRELKA: Sure. Temporal proximity.

10 THE COURT: Yeah, but temporal proximity, it's  
11 months later.

12 MR. STRELKA: Right, it's November 30, 2015, and  
13 then she's terminated on December 17, 2016. But one of  
14 her --

15 THE COURT: No, no. No, she's not.

16 MR. STRELKA: February 17.

17 THE COURT: It's not December.

18 MR. STRELKA: I threw a 1 in front of a 2, for  
19 whatever reason, in my head.

20 THE COURT: It's February of '16, so there's three  
21 months. Okay?

22 MR. STRELKA: Sure. Yeah, but also --

23 THE COURT: Where's the causal link?

24 MR. STRELKA: Hold on. I'm getting there.

25 We also have later on in paragraph 36 is December

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1 1st, 2015, is an additional protected act. So that takes us  
2 into the month of December.

3 THE COURT: Right. Ms. Wilcox, she leaves work, she  
4 sends the e-mail, and, you know, even though -- let me just  
5 be clear on something. I'm not considering any of the  
6 extraneous things that Mr. Keuling-Stout filed in this case,  
7 all right, including the affidavit of Mr. Lyons that was  
8 embedded in his brief. Okay?

9 MR. STRELKA: Uh-huh.

10 THE COURT: I'm not considering any of that.  
11 Although, one could argue paragraph 35 renders the e-mail  
12 fair game. Okay?

13 MR. STRELKA: Right.

14 THE COURT: Because you mentioned the e-mail,  
15 therefore, one could argue it renders it fair game. I'm not  
16 considering any of those attachments. We're here at the  
17 pleading stage.

18 MR. STRELKA: Right.

19 THE COURT: So let's stay on the pleading.

20 MR. STRELKA: Right. So we have a protected  
21 activity in December of 2015.

22 THE COURT: And what is that?

23 MR. STRELKA: Paragraph 36, she has a --

24 THE COURT: Okay. Right, she's concerned because  
25 Mr. Steele hit her --

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1 MR. STRELKA: Yes.

2 THE COURT: -- and grumbled something about women.  
3 That's what the allegation is. Don't even know exactly what  
4 it was, but he hits her and grumbles something about women.  
5 Right?

6 MR. STRELKA: Right, yes. Yes, and that there  
7 was --

8 THE COURT: Okay. And you don't allege what he  
9 says.

10 MR. STRELKA: No.

11 THE COURT: Because she doesn't know what he said.

12 MR. STRELKA: No. We know he said something about  
13 women, punched her, and then there was a comment from another  
14 individual that there was hostility toward women.

15 And what she complains about on December 1st,  
16 according to paragraph 36, to discuss her e-mail and the  
17 incident, expressed how she felt the Carroll County  
18 Commonwealth's Attorney tolerated sexual discrimination  
19 against women.

20 So that's a protected act under the law on December  
21 1st, 2015. And --

22 THE COURT: And where is the causal link between  
23 that and the termination for failing to comply with the leave  
24 policy and the insubordination when she wouldn't sign the  
25 written reprimand?

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1 MR. STRELKA: It stands outside the boundaries that  
2 that would actually ever be insubordination. Here she is,  
3 she's an educated attorney; he indicates to her regarding  
4 this disciplinary action that there's a common work policy  
5 that's at play. She asks to review the policy. And  
6 immediately thereafter, he terminates her, within seconds or  
7 minutes.

8 And all of that, from our perspective, indicates  
9 that there was a -- he was waiting for a reason. He was  
10 looking. He seized upon this moment.

11 You know, I'm not contesting tardies or  
12 absenteeisms. She wasn't terminated for that. She was  
13 terminated for insubordination and having a conversation with  
14 your boss in which you're exploring -- again, she wasn't even  
15 contesting the tardies or absenteeisms. She was asking about  
16 policy itself, which is a very normal -- it's a reasonable  
17 question and one that wouldn't seemingly violate any policy  
18 that the employer would have or could have.

19 THE COURT: She's an at will employee.

20 MR. STRELKA: Sure.

21 THE COURT: And -- okay. No, I understand. I  
22 understand your argument. I just wanted to know if there was  
23 something more. What you're simply arguing is that it comes  
24 three months later?

25 MR. STRELKA: Yes, it comes in two and a half.

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1 THE COURT: Okay. Is there any other linkage at all  
2 between the termination events, the leave issue and the  
3 written reprimand? And all that happens like right there.  
4 It comes to a head --

5 MR. STRELKA: Right.

6 THE COURT: -- and he stands up, turns his back, and  
7 says, "You're fired." Is there any other linkage other than  
8 the fact that it's three months after this November  
9 30/December 1 episode with Mr. Steele?

10 MR. STRELKA: Respectfully, Your Honor, I'll  
11 characterize it as two and a half months. We might be  
12 parsing things a little too far there, but the -- so we have  
13 two and a half months between the December -- the December  
14 conversation and when she's terminated on February 17.

15 THE COURT: I'll give you that, Mr. Strelka. It is  
16 something in the nature of 75 days or so.

17 MR. STRELKA: I want all the temporal proximity I  
18 can grab here, Your Honor. But it is that, it's the temporal  
19 proximity, and the fact that there's no legitimate reason for  
20 anyone to terminate someone for asking the question that she  
21 asked.

22 THE COURT: Okay. All right. I think I understand  
23 your argument on Count Two.

24 Count Three alleges hostile work environment.

25 MR. STRELKA: Right.

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1 THE COURT: Okay. And you know what the case law is  
2 as well as I do. It's got to be severe or pervasive.

3 MR. STRELKA: Right.

4 THE COURT: And all you allege is one hitting  
5 episode.

6 MR. STRELKA: True.

7 THE COURT: Okay?

8 MR. STRELKA: Yeah.

9 THE COURT: You would agree with me that under the  
10 case law that is neither severe nor pervasive?

11 MR. STRELKA: I'll say, though -- Your Honor, I  
12 apologize because the case, the name skips my memory at this  
13 moment, but it was the case that I believe Judge Moon had  
14 that was reversed by the Fourth Circuit. I know the facts  
15 differed slightly, but it was an incident in which the  
16 employee was assaulted once, and I believe Judge Moon  
17 dismissed it on a 12(b)(6), and the Fourth Circuit said that  
18 it was sufficient. The assault in that case had a more  
19 sexual connotation than the assault here.

20 THE COURT: There's nothing sexually related to  
21 this. She said he punched her and she says, "Don't use me as  
22 demonstrative evidence."

23 MR. STRELKA: Right. But whatever was uttered prior  
24 to that punch was sufficient enough for a witness to state  
25 that there's a hostile environment here, hostile toward



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1 women. Her name escapes me right now, but I'll get right  
2 back to it. Hold on.

3 THE COURT: Ms. Spangler.

4 MR. STRELKA: Yes.

5 THE COURT: Well, I mean, I'm trying to understand  
6 paragraph 30. "Ms. Wilcox directed her attention to  
7 Ms. Spangler and exclaimed that there was hostility in the  
8 room against women."

9 I read this as saying Ms. Wilcox said --

10 MR. STRELKA: I'm sorry, Your Honor. I misread  
11 that. I apologize.

12 THE COURT: -- there was hostility in the room.

13 MR. STRELKA: I strike that. I strike that. Sorry.

14 THE COURT: That's the way I read it.

15 MR. STRELKA: Right.

16 THE COURT: Okay.

17 MR. STRELKA: I've been covering too much for snow  
18 days, Your Honor.

19 THE COURT: Am I reading that wrong?

20 MR. STRELKA: You're reading that correctly.

21 THE COURT: Okay. All right. Okay. The Judge Moon  
22 case, is that *Davis*?

23 MR. STRELKA: I believe so.

24 Your Honor, as it relates to severe and pervasive  
25 activity, it's a very high --

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1 THE COURT: I understand the case law. One episode,  
2 okay, one incident can be so severe that it gives rise to a  
3 hostile work environment. You hang a noose in a locker room,  
4 you sexually molest another person, one episode counts.

5 MR. STRELKA: Right.

6 THE COURT: The question is whether this episode --

7 MR. STRELKA: Right.

8 THE COURT: -- is so severe in and of itself.  
9 Because you don't allege a lot of pervasive stuff. All you  
10 allege is, well, he became distant from her, right?

11 MR. STRELKA: Right.

12 THE COURT: Okay.

13 MR. STRELKA: Right. And that the battery occurred  
14 within some context of a discussion regarding gender.

15 THE COURT: Something about Thanksgiving.

16 MR. STRELKA: And turkey.

17 THE COURT: Okay. Let's talk about Count Four.

18 MR. STRELKA: Sure. Is that the --

19 THE COURT: That's your due process liberty  
20 interest. And the question I have for that is: Where is --  
21 where is the -- it looks to me like under the *Sciolino* case,  
22 the Fourth Circuit, that there's got to be some false  
23 statements made by Mr. Lyons about Ms. Wilcox publicly.

24 MR. STRELKA: Yeah, right.

25 THE COURT: And where's the public here?

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1 MR. STRELKA: Your Honor, I may have to -- I may  
2 have to -- because this has occurred, and I may have to amend  
3 to be more specific here. But first and foremost, the  
4 *Sciolino* case involved false statements that were placed in  
5 the personnel file.

6 I don't have the personnel file currently, but we do  
7 know that the termination was categorized as insubordination.

8 Now, before I jump into this issue, I just want to  
9 highlight something under state code, a case that just gets  
10 hot under everyone's collar. And that's 60.2-623. That's  
11 the state code that talks about information from VEC hearings  
12 being barred from judicial proceedings.

13 THE COURT: I understand.

14 MR. STRELKA: Okay. That code section --

15 THE COURT: We've looked at that section. We have.

16 MR. STRELKA: Yes, that code section specifically  
17 excludes information that's gathered during the fact-finding  
18 interview, the first-level appeals, and the commission  
19 appeals.

20 This case proceeded on an appeal by -- under  
21 different counsel, by Mr. Lyons to the Circuit Court of  
22 Carroll County, where she works; and in that appeal, argued  
23 by Michael Bedsaul, the Commonwealth Attorney accusing my  
24 client of insubordination. And they had a special judge  
25 brought in because of, you know, the situation. And so this

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1 was publicly declared in Circuit Court. There are case  
2 documents that said she was insubordinate that had been filed  
3 in the Circuit Court where she works. So that is a public  
4 statement from that office that my -- a false statement, that  
5 my client engaged in insubordination. And she won that, by  
6 the way. They said she was guilty of misconduct vis-a-vis  
7 insubordination.

8 THE COURT: So you're saying that statute would not  
9 bar consideration for the matter that took place in the  
10 Circuit Court?

11 MR. STRELKA: I read it three times today, and I  
12 don't believe so. And I'd be happy -- I mean, I'm always  
13 willing to be corrected. You know, I've read it, and  
14 specifically it says -- it specifically bars information  
15 from, and then it lists the three proceedings and the code  
16 sections that regard those three proceedings: The  
17 fact-finding interview, the first-level appeals, the  
18 commission appeals. It says --

19 THE COURT: It says any judicial or administrative  
20 proceeding.

21 MR. STRELKA: That's regarding information from  
22 those proceedings.

23 THE COURT: "Neither such information nor any  
24 determination or decision rendered under 619, 620, or 622  
25 shall be used in any judicial or administrative proceeding."

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1 So you're saying --

2 MR. STRELKA: Circuit Court.

3 THE COURT: -- Circuit Court is excluded from that?

4 MR. STRELKA: It's a court of public record. Anyone  
5 can walk down there today, go in there, and get all that  
6 information, everything that's filed.

7 THE COURT: Okay. I appreciate your argument on  
8 that. I'll have to study that.

9 MR. STRELKA: Okay. That was the basis --

10 THE COURT: Of course, you haven't pled that.

11 MR. STRELKA: I know. To be honest, I was sheepish  
12 at the time when writing the complaint about the  
13 confidentiality and privacy angle of the VEC statute. I  
14 wanted to be -- I didn't want to violate anything. But I've  
15 gone back and I've read it and I think we're in the right.

16 THE COURT: Yeah, I'd have to go back and look at  
17 what those three particular statutory provisions mean. But  
18 regardless, you didn't plead it.

19 MR. STRELKA: I understand, but I can.

20 THE COURT: Okay.

21 MR. STRELKA: I'll just add it.

22 THE COURT: All right. What else would you like to  
23 argue, Mr. Strelka?

24 MR. STRELKA: Oh, let me look.

25 Yeah, the cases cited on the -- regarding wrongful

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1 conviction and very much enhance the prosecutorial role.

2 I have some on qualified immunity but the only thing  
3 mentioned in it is not really probative at this stage. I  
4 don't have --

5 THE COURT: Hold on a second, Mr. Strelka.

6 MR. STRELKA: Yes.

7 THE COURT: Sorry for that. I had to confer with  
8 my -- with the brains in the operation.

9 MR. STRELKA: I understand.

10 Your Honor, unless you have any further questions, I  
11 don't have anything else to say other than we'd ask for leave  
12 to amend if the Court would find the counts insufficiently  
13 pled.

14 Thank you.

15 THE COURT: Okay. Thank you, Mr. Strelka.

16 Ms. Royer, would you like to say anything else?

17 MS. ROYER: I have one hopefully brief point to  
18 make, Your Honor.

19 The only point that I'd like to make is with respect  
20 to counsel's request for discovery, and that's that no amount  
21 of discovery will change the law in this case.

22 And when we were looking at the *Butler* factors and  
23 looking at state code, the law is clear that the county does  
24 not have the ability to control the employment decisions made  
25 by constitutional officers.

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1           If the Court looks at Virginia Code Section  
2 15.2-1600B, it states -- and by the way, this is the section  
3 dealing with those constitutional officers. It states,  
4 "Nothing in this title shall be construed to authorize the  
5 governing body or the chief administrative officer of a  
6 locality to designate and elect a constitutional officer to  
7 exercise a power or perform a duty which the officer is not  
8 required to perform under applicable state law without the  
9 consent of such officer" -- and I'd like to emphasize -- "nor  
10 by designation to diminish any officer's powers or duties as  
11 provided by applicable state law, including the power to  
12 organize their offices and to appoint such deputies,  
13 assistants, and other individuals are as authorized by law  
14 upon the terms and conditions specified by such officers."

15           So this code section prescribes the county's ability  
16 to make any kind of decisions for employment with respect to  
17 any of the constitutional officers or employees.

18           So no amount of discovery as to what -- some sum of  
19 money designated in a line item on a budget will change the  
20 law with respect to whether or not the county can control the  
21 decision-making of the constitutional officers in this  
22 regard.

23           Thank you.

24           THE COURT: Mr. Keuling-Stout, any additional  
25 argument you'd like to make, sir?

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1 MR. KEULING-STOUT: Your Honor, the reason that I  
2 put in the information which you said you were not going to  
3 look at or concern, think about, I do want to say that the  
4 reason I have that in there is Rule 8(c)1, which says, "In  
5 responding to a pleading, a party must affirmatively state  
6 any avoidance or affirmative defense, including," and it goes  
7 down to a line.

8 So my understanding of this -- and I looked at some  
9 cases that would indicate -- you do have to do affirmative  
10 defenses. And so what I was putting in there was affirmative  
11 defenses.

12 THE COURT: Well, that's fine. And you're entitled  
13 to do that, but I'm just not going to consider it on  
14 12(b)(6).

15 MR. KEULING-STOUT: I understand, but that's the  
16 reason I put it in there.

17 And also, when we talk about the senior -- the  
18 Commonwealth's Attorney, what he was attempting to do in  
19 writing and agreeing to was so that he could get -- she could  
20 do it now but not any time more. And what he was attempting  
21 to do was to get Ms. Wilcox to do what needed to be done.  
22 And what needed to be done was so that she wasn't the only  
23 person who just said, Oh, I'm not going to go today, because  
24 the others, all four of them, they had children, and they  
25 couldn't either. If all of them just decided, Oh, I'm not



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1 going to be there today, there would be nobody left to be  
2 able to go to the -- to the -- to do their work in the  
3 Circuit Court and in the -- what is it? The Circuit Court,  
4 and then there's one --

5 THE COURT: Juvenile domestic.

6 MR. KEULING-STOUT: Yeah, juvenile domestic, to do  
7 this work that had to be done. And so then she wasn't doing  
8 it, and she was giving it to them, and that's what it was all  
9 about.

10 And she could be -- there's nothing more than the  
11 administrative part that he was concerned about. And part of  
12 the administration was, yes, she was eight times or something  
13 more than she should have been, and there were all times when  
14 she could leave, and she did leave. And so he was trying to  
15 figure out: What am I going to do? I've got four people  
16 here. I've got lots to do. There's lots to be done. And if  
17 she's going to say, Oh, oh, oh, then he's going to say,  
18 Goodbye.

19 THE COURT: Thank you, sir.

20 Mr. Strelka?

21 MR. STRELKA: If the Court is of the mindset to  
22 dismiss the county from this case, I would just ask that the  
23 Court do so without prejudice. If this case were to proceed  
24 through discovery with the Commonwealth Attorney, it may --  
25 you know, I don't know the future. I don't have a crystal

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1 ball. But there may be information in discovery in the  
2 Commonwealth's Attorney case that could shed light onto the  
3 county's role, if there is such a role.

4 So I would ask that in the order, if the Court was  
5 going to dismiss the county, that it be without prejudice.

6 Thank you.

7 MR. KEULING-STOUT: Your Honor, could I have one  
8 more sentence?

9 THE COURT: Come on up.

10 MR. KEULING-STOUT: The purpose of the cases talking  
11 about absolute immunity, it is my understanding that you  
12 address the absolute immunity at the 12(b)(6) level.

13 THE COURT: I understand that. I understand that.

14 All right. The Court is prepared to rule as  
15 follows: First, I'm granting the 12(b)(6) by Carroll County,  
16 and I'm granting that with prejudice.

17 The allegations in this case are insufficient to  
18 meet the joint employer test under the *Butler* case, 793 F.3d  
19 404, 413 (4th Cir. 2015).

20 While, to be sure, the issue of a joint employment  
21 is a fact-intensive inquiry, there are insufficient facts  
22 alleged here. And, in fact, it would be impossible to allege  
23 facts sufficient to meet the joint employer test here, given  
24 the statutory construct that exists providing for the county  
25 to provide space and some sort of salary for the

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1 Commonwealth's Attorney. But the Commonwealth's Attorney is  
2 a constitutional officer, and there's no allegation here of  
3 any authority to hire or fire, no allegation of any  
4 day-to-day supervision, including employee discipline.

5 There's an allegation of some salary paid under  
6 Virginia law. That's plainly insufficient as a matter of  
7 law.

8 The facts alleged belie any claim that the county  
9 would have had any responsibility in this case with regard to  
10 the adverse employment action taken. The allegation is, in  
11 fact, that the Commonwealth's Attorney stood up, turned his  
12 back, and said, "You're insubordinate; you're fired." No  
13 allegation that the county had anything to do with it.

14 This case is very much like, in fact, doesn't even  
15 rise to the level of that decided by Judge Dillon in the  
16 *Leuenberger versus Spicer* case, L-E-U-E-N-B-E-R-G-E-R, 2016  
17 WestLaw 355090, decided on January 28, 2016 by this court.

18 There they said, well, yeah, county provides some  
19 space, county provides some salary supplementation. And  
20 Judge Dillon correctly dismissed that case.

21 I'm granting the 12(b)(6) by Carroll County. I  
22 find -- and I'm not giving the plaintiff leave to amend. I  
23 find any amendment would be futile because it would be flat  
24 inconsistent with the other allegations in this case.  
25 Carroll County is out.

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1 Now, as to Mr. Lyons and Mr. Steele, again, I'm not  
2 considering the evidence submitted by Mr. Lyons and  
3 Mr. Steele with the affidavits embedded into the brief.

4 Count One, gender discrimination. The allegations  
5 fail to make a prima facie case. I'm dismissing Count One.

6 In particular, there is no sufficient allegation  
7 that the employer treated similarly situated employees  
8 outside of a protected class more favorably. That is  
9 required for a prima facie case of gender discrimination, and  
10 there is no sufficient factual allegations here. All there  
11 is is the allegation of paragraph 95, which is entirely  
12 conclusory, that says similarly situated male employees did  
13 not have to endure the discriminatory treatment that  
14 Ms. Wilcox endured.

15 No facts in this 155 paragraph complaint suggest any  
16 disparate treatment in favor of men in this case. The  
17 complaint is simply devoid of any facts suggesting that the  
18 termination was based on gender. There's nothing to suggest  
19 it was based on gender or that male employees were allowed to  
20 exceed the leave policy without getting a reprimand.

21 I dismiss Count One, but I grant leave to amend.  
22 I'm going to give leave to amend as to Count One.

23 Retaliation, Count Two. Now, there is  
24 insufficient -- I'm dismissing Count Two. There is  
25 insufficient causation as a matter of law between the

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1 November 30th, 2015 punch episode and the termination. They  
2 are on the face of the allegations completely unrelated.  
3 There's nothing at all linking them except for two and a half  
4 months, and that's not even a temporal link. There's nothing  
5 here to link that one episode that took place in November of  
6 2015, and the e-mail that afternoon and a meeting the next  
7 day, with the termination that happens later on in February.  
8 Nothing. Zero. Zip.

9 I am going to -- I'm going to dismiss Count Two,  
10 retaliation. I'm going to grant leave to amend.

11 Count Three, hostile work environment. The episode  
12 on November 30th, 2015 is the only act alleged of a hostile  
13 work environment, except perhaps that maybe some folks were  
14 distanced. All right. That is plainly not severe or  
15 pervasive enough to create an objectively hostile or abusive  
16 work environment under the law.

17 It's nothing like the *Davis* case that Judge Moon  
18 had. That was a case in which there was a grabbing of female  
19 body parts. And plainly that was a hostile work environment.

20 This is a punch, at most a punch to the shoulder, in  
21 the context of a discussion about somebody else's family at  
22 Thanksgiving and some sort of grumbled comment about women.  
23 That one episode is not sufficient to give rise to a hostile  
24 work environment claim. I think it would be futile to allow  
25 amendment. I am not allowing amendment of the hostile work

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1 environment claim. There's nothing in here that supports  
2 anything remotely suggesting a hostile work environment.

3 Count Four, deprivation of liberty interest. On its  
4 face, and as Mr. Strelka conceded, there are insufficient  
5 allegations that the Commonwealth's Attorney made the reason  
6 for the termination -- insubordination -- public. There is  
7 this statutory confidential procedure that Mr. Strelka says  
8 does not apply to what may have happened at the Circuit Court  
9 of Carroll County. And I'm going to give him leave to amend  
10 Count Four. I am going to dismiss Count Four. It's  
11 insufficiently pled.

12 Now, with regard to the part of the allegation where  
13 he alleges that one prospective employer has inquired into  
14 her personnel file, well, that's not sufficient under the  
15 *Sciolino versus Newport News* case out of the Fourth Circuit,  
16 S-C-I-O-L-I-N-O, 480 F.3d 642, 649. You've got to allege  
17 more than just a personnel file might have been available.  
18 There's no allegation that the Commonwealth Attorney in this  
19 case has a practice of releasing personnel files. I can't  
20 imagine anyone does. And there's no allegation that the  
21 Commonwealth's Attorney was likely to release the personnel  
22 file. So just putting information in a personnel file of  
23 insubordination is not enough.

24 I don't know about the Carroll County public Circuit  
25 Court hearing, and I'm going to give Mr. Strelka leave to

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1 amend Count Four as to that.

2 Count Five, common law battery against Mr. Steele,  
3 at least at this point I'm going to continue to exercise  
4 supplemental jurisdiction over that. If, however, I dispose  
5 of the rest of this case, either at another Rule 12(b)(6) or  
6 at a Rule 56, I am likely to -- I'm not going to hang on to  
7 this case if all there is is Count Five, common law battery.  
8 Okay?

9 Now, let's talk about immunity for a minute. I  
10 don't agree with Mr. Keuling-Stout that absolute immunity  
11 applies. I believe absolute immunity under the *Van de Kamp*  
12 case applies when the Commonwealth's Attorney is performing  
13 traditional functions of an advocate. And *Van de Kamp* was  
14 about discovery and complying with the constitutional  
15 requirements of *Giglio*.

16 In fact, there's a paragraph in the *Van de Kamp*  
17 decision which seems to suggest that that sort of absolute  
18 immunity doesn't apply to the kind of allegations that are  
19 here.

20 In that case, the Court said at page 344, "The types  
21 of activities on which Goldstein's claim focus necessarily  
22 require legal knowledge and the exercise of related  
23 discretion, e.g., in determining what information should be  
24 included in the training or the supervision or the  
25 information system management."

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1 Again, the issue in that case was compliance with  
2 *Giglio*. What was the prosecutor required to train his staff  
3 about; that was the aspect of administration that was at play  
4 in *Van de Kamp*.

5 That's a far cry different from what's at issue in  
6 this case.

7 And listen to what the next line of *Van de Kamp*  
8 says. "And in that sense, also Goldstein's claims are unlike  
9 claims of, say, unlawful discrimination in hiring employees."

10 That line seems to suggest that absolute immunity  
11 would not apply in this context, so I'm not going to -- I am  
12 not going to find that absolute immunity applies.

13 Now, I will say this. No one has raised qualified  
14 immunity at this point. I'm not going to rule on qualified  
15 immunity because it has not been pled in this case. And so I  
16 am not going to rule on it because I don't think it's before  
17 me. No one has argued it. No one has raised it in the  
18 briefs, and I've read all the briefs.

19 So I do not believe this prosecutor is subject to  
20 absolute immunity for making this non -- for making this  
21 decision about employment outside the traditional function of  
22 advocacy. So I don't think absolute immunity applies, and so  
23 I'm not going to find that. Maybe the Fourth Circuit will  
24 find me wrong, but I don't think so. Well, you never know;  
25 they might. There's three of them and only one of them when



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1 they get to think about these things.

2 So in sum, I'm going to do this. I'm going to enter  
3 an order dismissing the county from this case in its  
4 entirety. And I'm not granting leave to amend because it  
5 would be futile. And I'm doing it with prejudice because the  
6 county ought not to be burdened with this litigation, because  
7 there is no basis for suit against the county in this case.

8 I am dismissing the hostile work environment claim,  
9 which is Count Three. I am dismissing that claim with  
10 prejudice, and I'm not granting leave to amend. There is  
11 nothing here that suggests there is anything -- anything --  
12 that would come anywhere near an objectively hostile or  
13 abusive work environment.

14 I am dismissing, however, without prejudice, Count  
15 One, gender discrimination; Count Two, retaliation; and Count  
16 Four, deprivation of liberty interest. And I'm giving  
17 Mr. Strelka leave to amend.

18 I'm going to give Mr. Strelka 14 days' leave to  
19 amend his complaint as to those counts in this case.  
20 Obviously, I haven't been asked to rule on Count Five, and  
21 I'm not dismissing Count Five.

22 But I want to say this. Okay? And I'm going to put  
23 this in my order. I have a hard time seeing on the facts of  
24 this case how -- and out of an abundance of caution, I'm  
25 giving Mr. Strelka an opportunity to replead Count One, but I

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1 don't see it under the facts of this case, as I understand  
2 it.

3 And on Count Two, the retaliation claim, I don't see  
4 it under the facts of this case. I just simply don't see  
5 there being sufficient facts to allow this to go to a jury on  
6 Count One or Count Two, unless there's something out there  
7 that I'm not aware of.

8 Count Three is woefully inadequate, and I'm not even  
9 giving him leave to amend on that.

10 Count Four is the claim about the liberty interest,  
11 and I just don't know about that.

12 But I'm going to say this about Count One and Count  
13 Two. If Count One and Count Two are re-alleged in this case,  
14 the sexual harassment -- excuse me, the retaliation based on  
15 sex or gender and the gender discrimination case, I just  
16 don't see that that is what is involved in this case based on  
17 the allegations. And if Counts One and Two are re-alleged  
18 and they do not survive another Rule 12(b)(6) or a motion for  
19 summary judgment, I'm going to entertain, as to those two,  
20 sanctions for -- for attorney's fees and costs in defending  
21 against Count One and Count Two, because we all have an  
22 obligation under Rule 11 to make these pleadings in good  
23 faith, either in accordance with the law or for extension of  
24 the law; and I don't see how in this case any reasonable  
25 argument can be made, unless there's some facts alleged that

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1 I'm not aware of, as to how a claim is going to be able to  
2 survive Rule 56 on Counts One or Two. I just -- I don't see  
3 it.

4 I'm not making that position -- I'm not taking that  
5 position with regard to Count Four simply because I'm taking  
6 Mr. Strelka at his word that that -- that these things were  
7 said in Circuit Court, and we'll go there.

8 Count Three is gone. Count Five remains. And the  
9 county is gone.

10 Okay. I'm going to enter an order to that effect  
11 just as soon as I can.

12 All right. Anything further from you, Mr. Strelka?

13 MR. STRELKA: No, Your Honor.

14 THE COURT: All right. Anything else from you,  
15 Ms. Royer?

16 MS. ROYER: No, Your Honor.

17 THE COURT: And Mr. Keuling-Stout?

18 MR. KEULING-STOUT: No, Your Honor.

19 THE COURT: Okay. Thank you all. Ask the marshal  
20 to declare a recess.

21 (Proceedings adjourned, 4:24 p.m.)

22 CERTIFICATE

23 I, JoRita B. Meyer, certify that the foregoing is a  
24 correct transcript from the record of proceedings in  
the above-entitled matter.

25 /s/ JoRita B. Meyer

Date: 1/11/2019